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REPORTS
OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, THE COURT OF APPEAL OF NEGARA BRUNEI DARUSSALAM, AND THE PRIVY COUNCIL.

PRIVY COUNCIL REPORT

LOH WAI LIAN v. S.E.A. HOUSING CORPORATION SDN. BHD.

[P.C. (Lord Bridge of Harwich, Lord Templeman, Lord Griffiths, Lord Mackay of Clashfern & Lord Oliver of Aylmerton) February 9 & March 3, 1987]

[Privy Council appeal No. 39 of 1985]

Contract – Sale of land and house – Delay in completion – When cause of action accrued – Limitation – Limitation Ordinance, 1953, s.6(1) – Housing Developers (Control and Licensing) Rules 1970, r.12.

In this case the respondent, a licensed housing developer, had entered into a contract for the purchase of a shop house to be erected on a housing estate for $175,000 payable by stage payments as the building proceeded. Clause 17 of the contract provided: "Subject to clause 32 hereof and/or to any extension or extensions of time as may be allowed by the Controller the said building shall be completed and ready for delivery of possession to the purchaser within eighteen (18) calendar months from the date of this Agreement. Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser."

In fact the building was not completed on the due date *i.e.* September 18, 1975. Possession was not finally delivered until November 7, 1977. On April 21, 1980, the appellant demanded payment of the sum of $29,972.01, a sum equivalent to 8% on the full price $175,000 calculated for a period of twenty five months and twenty one days. On September 9, 1982, the appellant applied for summary judgment. Judgment was given by the Senior Assistant Registrar for the appellant. The respondent appealed to the High Court, where the appeal was allowed, the learned Judge holding that it was statute barred as he held that the action had accrued on September 18, 1975 when the period of eighteen months prescribed by the contract expired. A further appeal to the Federal Court was dismissed – see [1984] 2 M.L.J. 280, and the appellant appealed to the Privy Council.

Held: (1) the whole tenure of clause 17 of the contract is that the vendor is assuming as a matter of contract and subject to the occurrence of the condition provided that the building remains uncompleted on the stipulated date, an express contractual obligation to pay a single sum which cannot become due, because it cannot be ascertained, until the building has been completed and possession can be delivered;

(2) the only sensible construction of clause 17 is that it imposes an obligation to pay in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for;

(3) the appeal should be allowed and the order of the Senior Assistant Registrar restored.

Cases referred to:

(1) *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo* [1982] 2 M.L.J. 31.

(2) *Yorkshire Electricity Board* v. *British Telecom* [1986] 1 W.L.R. 1029, 1034; [1986] 2 All E.R. 961.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Raymond Kidwell Q.C. (*John Greenbourne* with him) for the appellant.

George Newman Q.C. (*David Lingam* with him) for the respondent.

Cur. Adv. Vult.

Lord Oliver of Aylmerton (delivering the Judgment of the Board): In 1966 there was introduced in West Malaysia a scheme for the protection of purchasers of new houses and for the control and licensing of housing developers. Its provisions are contained in the Housing Developers (Control and Licensing) Act 1966 (Act 118). The Act laid down stringent provisions for licensing developers and in section 24 conferred upon the Minister of Local Government and Housing power to make regulations which might *(inter alia)* "regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser." That power was exercised by the Housing Developers (Control and Licensing) Rules 1970 which came into force on July 15, 1970. Rule 12(1) provided:

"Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely ..."

There followed a list of twenty-one matters which were required to be contained in the contract, the relevant ones for present purposes being the following:

"(o) Provisions specifying the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall be not later than 18 months after the date of signing of the contract of sale; ...

(r) Provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale:"

Rule 12(2) conferred on the Controller (an office established by the Act) power to waive or modify the provisions of rule 12(1) in respect of any contract of sale if he was satisfied that special circumstances rendered compliance with that Rule impracticable or unnecessary.

The respondent is a corporate licensed housing developer which, on March 18, 1974, entered into a contract with the appellant for the purchase of a shophouse to be erected on a housing estate at a price of 175,000 Malaysian Ringgit, payable by stage payments as the building proceeded in accordance with clause 3 of the contract. Clause 17 of the contract was in the following terms:

"Subject to clause 32 hereof and/or to any extension or extensions of time as may be allowed by the Controller the said building shall be completed and ready for delivery of possession to the purchaser within eighteen (18) calendar months from the date of this Agreement. Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser."

Clause 32, which has an historical significance in the events leading up to this appeal, was a clause which purported to exonerate the respondent from liability for failure to perform the contract for causes outside the respondent's control including *inter alia* disability of contractors or subcontractors employed by the respondent.

In fact the building was not completed on the due date, *i.e.* September 18, 1975. Possession was not finally delivered until November 7, 1977. On April 21, 1980, the appellant by a letter from the solicitors demanded payment of the sum of $29,972.01, a sum equal to interest at 8% per annum on the full price of $175,000 calculated for a period of twenty five months and twenty one days. The respondent's solicitors replied on April 26, 1980, repudiating liability for the sum claimed and basing themselves on clause 32 of the contract, alleging unavoidable shortages of sub-contractors and building materials. That defence was never put to the test and there the matter rested for the moment.

On March 19, 1982, however, the Federal Court delivered judgment in a case of *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo*[1] which concerned a contract with the respondent containing, as clause 32, provisions identical with those of clause 32 in the contract with which this appeal is concerned. The Federal Court there held that clause 32 was void since it contradicted provisions expressly required to be inserted in the contract by rule 12(1) of the 1970 Rules and, in particular, paragraphs (o) and (r) of that rule. Whilst it was permissible for details not specifically mentioned in the Rules to be inserted into individual contracts, such details had to be consistent with the Act and the Rules. The defence adumbrated by the respondent's solicitors in their letter of April 26, 1980, therefore fell to the ground and on September 9, 1982, the appellant issued a specially endorsed writ claiming a sum of $29,874.65 (being 8% per annum on $175,000 over 779 days) together with interest from July 27, 1982. Why the claim for interest was limited by reference to this latter date is unclear. A summons for summary judgment was subsequently issued and was heard before the Senior Assistant Registrar on April 14, 1983, when judgment for the sum claimed and interest was entered in favour of the appellant. From that judgment the respondent appealed to the Judge in Chambers and on September 29, 1983 Mohamed Dzaiddin J. allowed the appeal and dismissed the appellant's claim, holding that it was statute-barred under the provisions of section 6(1)(a) of the Limitation Ordinance 1953. That section provides:

"Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say – (a) actions grounded on a contract or on tort ..."

The judge's view was that the appellant's cause of action had accrued on September 18, 1975, when

the period of eighteen months prescribed by the contract expired, and that accordingly her writ was eleven months out of time. The appellant appealed to the Federal Court which, on February 23, 1984, dismissed her appeal. The grounds upon which the appeal was dismissed were contained in a written judgment of Mohamed Azmi F.J. delivered on June 28, 1984. From that judgment the appellant now appeals to their Lordships' Board pursuant to special leave granted on December 17, 1984.

The reasoning both of Mohamed Dzaiddin J. and of the Federal Court was that since the sum claimed was no more than damages for breach of contract to be ascertained by agreement between the parties on a particular basis the appellant's cause of action accrued immediately she was in a position to issue a writ claiming damages for failure to complete on the due date, even though it was impossible at that time to quantify the amount of her claim or to recover judgment for the amount which the respondent, in the event, became obliged to pay. That date was the date on which, under clause 17 of the contract, the building ought to have been completed. The provision for payment of liquidated damages was merely a formula for the quantification of the claim which then accrued and accordingly the entire claim of the appellant became barred on September 18, 1981, so that she was entitled to nothing.

Mr. Newman Q.C., with his customary frankness, has sought only faintly to support the proposition that the appellant's claim was barred *in toto* and was disposed to concede that in addition to a claim for damages for breach of contract there was a parallel claim in debt accruing from day to day so long as the building remained uncompleted with the result that the appellant's claim was timeously made in relation to the period from September 9, 1976 to November 7, 1977. Thus, theoretically, he submitted, the appellant could have issued a writ for an amount equal to one day's interest at 8% per annum on September 19, 1975 and a separate writ for a similar sum on each successive day thereafter. Mr. Kidwell Q.C., on the other hand, contended that both the trial judge and the Federal Court were wrong to approach the case on the footing that the claim was a simple claim for liquidated damages for breach of contract. He submitted, and their Lordships agree, that the analysis of the accrual of the appellant's cause of action depends not upon the label which was put upon the sums which the respondent became obliged to pay but upon what, on the proper construction of the contract, was the true nature of the respondent's obligation. To some extent there is a danger of becoming mesmerised by the term "liquidated damages" when applied to a payment to be made. It might equally well, for instance, be called "permissible penalty." What in essence the proviso to clause 17 was creating was a contractual obligation in a particular event to pay a single sum by way of indemnity for the period during which the appellant was kept out of the building for which, in large measure, she would already have paid, such sum being calculated upon a particular basis. The true construction of the clause, Mr. Kidwell submits, is that the respondent was undertaking to pay not a series of interest payments accruing *ex die in diem* but a single aggregate sum which could not be calculated and did not become due until the building was completed and ready to be handed over. Their Lordships have found Mr. Kidwell's submissions persuasive. It is, of course, beyond doubt that the failure to complete the building on the stipulated date was a breach of contract, but that is not, in their Lordships' view, necessarily determinative of the nature of the obligation which follows. The starting point is that this contract is one the terms of which are regulated by statute and which therefore falls to be construed in the light of the statutory provisions to which it was designed to give effect. Rule 12(1)(r) imposed on the developer the obligation to indemnify the purchaser for any delay in delivery of possession and then went on to provide a formula by which "the amount of indemnity" was to be calculated. The use of the word "indemnity" is significant, for in its natural meaning it imports the notion of compensation for a loss already suffered when the compensation is paid (see, for instance, *Yorkshire Electricity Board* v. *British Telecom*[2]). The calculation of the amount of the indemnity was to be an entirely artificial one based on a day to day calculation of a rate of interest starting from the contractual completion date. This was to operate as the definitive ascertainment of the purchaser's right in respect of the delay which had occurred, but it did not, save in so far as a limitation is implicit in the use of the word "indemnity", otherwise fetter or limit any right of damages for breach of contract. That rule, when incorporated into the actual contract between the parties, was modified in two ways. First, the "indemnity" provided for by the rule was translated as "agreed liquidated damages." Secondly, the formula for calculation of the indemnity was modified by specifying not only the *terminus a quo* as provided in the rule but also the *terminus ad quem*, that is to say, the date of actual completion

and delivery of possession. It is, in their Lordships' view, tolerably clear that the only rational purpose of defining a payment to be made by the vendor, by reference to what has become a conventional term, as "agreed liquidated damages" was to make it clear that the purchaser was not to have any right to any other payment by way of damages in respect of the delay over and above what the vendor was undertaking to pay, for there could not sensibly be any prospect of a sum calculated according to mandatory statutory provisions being held to be irrecoverable as a penalty. But the description of the amount as "liquidated damages" cannot in any event be determinative of the date on which the sum is to be payable. The clause has to be reasonably and sensibly construed. The obligation is introduced by the words "the vendor shall pay" and there follows the calculation of the sum which he is to pay carefully defined by its opening and closing date.

A construction which would import into the clause a fresh obligation on the vendor to pay the calculated amount at the end of each day would be capricious, involving as it does a series of breaches of contract as each day passes without payment being made. The whole tenor of the clause is, in their Lordships' view, that the vendor is assuming as a matter of contract and subject to the occurrence of the condition precedent that the building remains uncompleted on the stipulated date, an express contractual obligation to pay a single sum which cannot become due, because it cannot be ascertained, until the building has been completed and possession can be delivered. If the question is asked "in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?", the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered. In their Lordships' judgment, the only sensible construction of clause 17 is, as Mr. Kidwell has contended, that it imposes an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed and that the order of the Senior Assistant Registrar should be restored. The respondent must pay the costs before their Lordships' Board and in the courts below.

Appeal allowed.

Solicitors: *Philip Conway Thomas & Co.; Charles Russell & Co.*